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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 151

EVA SIMPSON, BETTY BURRELL AND GRACE PROUDFOOT, ETC., ET AL.,

Appellants,

vs.

CITY OF LOS ANGELES, GEORGE M. UHL, RICHARD L. BONNER, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION

MORRIS LAVINE,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	1
City ordinance involved	2
Nature of the case and rulings below	3
Cases believed to sustain jurisdiction	10
Appendix "A"—Opinion of the Supreme Court of California	12

Table of Cases Cited

Beck v. *Ransome-Crummey Co.*, 42 Cal. App. 674	10
H. Moffatt Co. v. *Hecks*, 68 Cal. App. 35, 228 P. 546	10
Marx v. *Ebner*, 180 U.S. 314	11
People v. *Broad*, 216 Cal. 1	10
Roberts v. *Jacobs*, 154 Cal. 307	11
Roller v. *Holly*, 176 U.S. 398	11

Statutes Cited

City Ordinance of the City of Los Angeles, Section 53.11, sub-section (h)	2, 3
Constitution of the United States, 14th Amendment,	3, 4, 10
United States Code, Title 28, Section 1257 (2)	1

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. 21945

2nd Civil No. 18529

EVA SIMPSON, BETTY BURRELL AND GRACE PROUDFOOT, INDIVIDUALLY AND AS TAXPAYERS OF THE CITY OF LOS ANGELES, AND ON BEHALF OF ALL OTHER TAXPAYERS OF THE CITY OF LOS ANGELES, AND FRANCES STANCLIFF,

Plaintiff and Appellants,

vs.

CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, GEORGE M. UHL, RICHARD L. BONNER, JOHN DOE I, DOE II, DOE III, DOE IV, AND DOE V,

Defendants and Respondents,

and

COLLEGE OF MEDICAL EVANGELISTS, ET AL.,

Interveners and Respondents.

JURISDICTIONAL STATEMENT

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, appellants herewith set forth their Jurisdictional Statement:

A

Jurisdiction is conferred by Title 28, Section 1257(2) as follows:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being re-

pugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

B

Appellants are residents and taxpayers of the City of Los Angeles and owners of dogs. The State Statute involved is a City Ordinance of the City of Los Angeles known as Subsection (h) of Section 53.11, providing as follows:

"Whenever any reputable institutions of learning hospitals, research laboratories or their allied institutes in the City of Los Angeles shall make application to the Health Officer of the City of Los Angeles for permission to use humanely unclaimed impounded animals for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease, the Health Officer, on being satisfied that the said animals are to be so used, shall, from time to time, certify to the Department of Animal Regulation the names and addresses of said institutions of learning, hospitals, research laboratories and their allied institutes which he is satisfied will use animals humanely for the purposes above specified.

It shall be the duty of the Department of Animal Regulation to surrender unclaimed impounded animals for such uses only when applied for by the institutions of learning, hospitals, research laboratories and their allied institutes which have been certified by the Health Officer as herein provided. No animal shall be surrendered except as authorized by law.

In order to give the owners of impounded animals time within which to re-claim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days.

No animal shall be surrendered for medical research, the owner of which has turned over such animal to the Department of Animal Regulation for destruction. Any such request for destruction of any animal by the owner thereof shall be complied with by the department.

The Department of Animal Regulation shall adopt and enforce rules and regulations providing for the care of animals so surrendered comparable to Supplement 211 Public Health Reports, 1949, Federal Security Agency, entitled, 'Care of the Dog Used in Medical Research.' "

This Ordinance became Subsection (h) of Section 53.11 of the Los Angeles City Ordinance. It is to be found in Municipal Code of the City of Los Angeles, as amended.

C

The plaintiffs, by this action, challenged the constitutionality of the ordinance under the Due Process Clause and the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiffs of their dogs without due process of law guaranteed by the Fourteenth Amendment in that there is not sufficient notice to the owners of dogs before the taking of their private property. Furthermore, it gives to certain private institutions and laboratories rights to take dogs from the pound which are not given to all other persons, including dog owners and dog lovers, and therefore denies the equal protection of the laws, being special legislation granting privileges to a limited class of institutions. The Ordinance further provides for the taking of dogs, turning them over to private institutions for experimental purposes, and giving the City Health Officer unlimited and arbitrary discretion to determine which institutions shall receive the impounded animals for the purposes of medical research.

The cause first came up in the Superior Court, where demurrers to the complaint were sustained with leave to amend. Plaintiffs failed to amend and judgment was thereafter entered in favor of the defendants. In the District Court of Appeal of the State of California, Second Ap-

pellate District, Division One, that court reversed the judgment of the Superior Court and held that the Ordinance was unconstitutional. The cause was then taken over by the Supreme Court of the State of California, in which court the constitutional questions under the Fourteenth Amendment to the Constitution of the United States were argued in written briefs and in oral argument, and the Ordinance was challenged as unconstitutional under the Fourteenth Amendment to the Constitution of the United States, under both the Due Process Clause and the Equal Protection Clause of the Federal Constitution. Both sides requested the Supreme Court of California to decide this issue with finality under the proceedings had. That court, on February 20th, 1953, rendered its judgment thereon and held the ordinance to be constitutional.

A dissenting opinion was written by Justice Carter, in which he held the ordinance to be unconstitutional for lack of sufficient provision of notice in the ordinance to apprise the dog owner that his dog may be seized, and that the ordinance is therefore unconstitutional in that it constitutes a taking of property without due process of law as the courts have defined that guarantee under the Constitution of the United States. Justice Carter's dissenting opinion regarding the question of notice follows:

> "I dissent.
>
> I cannot agree with the construction placed by the majority on the sections of the ordinance in question or that the notice provisions contained in those sections are sufficient to afford due process of law. Subsection (b) of section 53.11 provides that an owner must be notified within one day after a dog is impounded and that the animal may be *sold* thereafter if notice of sale is posted for two days; under subsection (h) it is provided that no dog may be *surrendered to a certified institution for experimental purposes* unless it has been impounded for at least five days. The majority of

this Court indulges in some legerdemain in the field of judicial legislation and comes up with the startling result that these two sections must be read together; that the one day notice provision in subsection (b) applies to subsection (h). By reading them together, the majority rewrites the ordinance so that it provides that an owner has five days after *receipt of actual notice* in which to reclaim his dog before it is surrendered for experimental purposes. This is done, we are informed, 'for the purpose of avoiding any question of invalidity *arising from the lack of a specific notice requirement in subsection (h).*' Using reasoning such as this, *any* statute could be 'interpreted' in such a way as to render it constitutional.

"The *only* notice provision applies to dogs about to be *sold*. There is no notice provision in the subsection providing for surrender of such dogs for experimental purposes. The sale of a dog and its surrender for experimental purposes are two entirely different things and there is no basis in logic for the statement of the majority that these two subsections must be read together and that the notice provision of the sale subsection applies to the surrender subsection. Subsection (b) deals specifically and exclusively with the sale of impounded dogs; subsection (h) deals only with the surrender of unclaimed, impounded animals for experimental purposes. The only provision of subsection (h) of section 53.11 which could possibly be construed as providing for any notice is that which reads: 'In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days.' But we are informed by the majority that subsection (b) which provides that the owner of the animal, if known, shall be notified within a period of one day, applies 'regardless of the proposed method of disposing of the animal.' We are told that this means 'actual notice' but that 'We need not speculate as to the possible methods by which actual notice may be given to a known owner,

since we may assume that the city will proceed in a manner sufficient to meet all requirements of law.' The subsection provides that the Department of Animal Regulation '*shall hold such animal for a period of one (1) day after the impounding of such animal, during which time* the owner of said animal, if known, shall be notified, after which time said animal may be sold. . . .' (Emphasis added.)

"The notice provision in subsection (b) which is to be read into subsection (h) does not take into consideration the fact that even if the names of the registered owner appears on the license tag, that one day's mailed notice in the city of Los Angeles is unreasonable and insufficient. It is pointed out in the briefs, that due to the present condition of the mail delivery service, it usually takes two days for ordinary mail to reach its addressee who resides within the city limits. It does not take into consideration the fact that the owner of the dog may not have a telephone; that the owner of the dog might be out of town. It does not take into consideration the length of time it might take an employee of the particular pound in question to ascertain, from the Department of Animal Regulation, the full name, address, telephone number, etc. of the owner of the dog. And, it should not be overlooked that the majority, in construing the notice required to be actual notice received by the owner, *has* overlooked the provision of the subsection which provides, by the use of mandatory language, that the animal shall be held for one day, during which time the owner shall be notified, and that *after* that time, the animal may be sold after posting notice of sale for two days. *This section provides for a three day period at the most before an impounded animal may be sold.* It should be noted, in this respect, that the posted notices are to be placed at (1) the public pound; (2) the city hall; (3) the central police station. There are five public pounds in Los Angeles. At which one is the notice to be posted?

I cannot understand how the one day provision in subsection (b) can possibly be construed to mean that

the owner of the dog must be given actual notice which must be received and that he thereafter (subsection (h)) has five days within which to reclaim his dog. However, by such reasoning, a majority of this Court, has now placed the constitutional stamp of approval upon the ordinance. In my opinion the notice provisions are insufficient to afford due process of law.

In judging what is due process of law, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand, respect being had to the cause and object of the taking (Wulzen v. Board of Supervisors, 101 Cal. 15; Imperial Water Co. v. Supervisors, 162 Cal. 14). While it is impossible to define with precision "due process of law" it means, broadly speaking, that before a man's property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard. It means further that the notice shall be a real and reasonable one, and the hearing, such as is ordinarily, or at least reasonably, given in similar cases (Beck v. Ransome-Crummey Co., 42 Cal. App. 674). Particularly applicable here is the statement found in People v. Broad, 216 Cal. 1, where this Court said " . . . the essential validity of the law was to be tested not by what has been done under it, but what may by its authority be done; and where a statute makes no provision for hearing or notice, either actual or constructive, *such defect is not supplied by the voluntary adoption by public officers of rules covering the situation.*" In Roller v. Holly, 176 U. S. 398, 409, it was said "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. Davidson v. New Orleans, 96 U. S. 97; Hagar v. Reclamation

District, 111 U. S. 701-702)." In that case, it was held (413) that "Without undertaking to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law . . . ." The Roller case was followed in *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306, 314, where it was said "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality *is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections*, *Milliken* v. *Meyer*, 311 U. S. 457; *Grannis* v. *Ordean*, 234 U. S. 385; *Priest* v. *Las Vegas*, 232 U. S. 604; *Roller* v. *Holly*, 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean supra*, and it must afford a reasonable time for those interested to make their appearance. . . . But when notice is a person's due, process which is a mere gesture is not due process." And in *Griffin* v. *Griffin*, 327 U. S. 220, 228, it was said "It is plain in any case that a judgment *in personam* directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the State's power over him, without such form of notice by personal or substituted service, *Wuchter* v. *Pizzutti*, 276 U. S. 13, 18-20; Restatement of Conflict Law, Sec. 75; and compare *Milliken* v. *Meyer*, 311 U. S. 457. *Such notice cannot be dispensed with even in the case of judgments* in rem with respect to property within the *jurisdiction of the court rendering the judgment*. *Roller* v. *Holly*, 176 U. S. 398, 409." (Emphasis added.)

If the dog is not wearing a license tag, the majority says that "its owner will not have any ground to complain of a failure to receive notice, because the ordinance places upon him the duty to make sure that the dog wears its license tag at all times except when it is

indoors or in an enclosed yard or pen." Apparently we now forget about the one day notice, actual and received, and the dog is held for the prescribed (subsection (h)) period of five days before being surrendered to a hospital or institution for experimental purposes. Under reasoning of the type indulged in by the majority, we can read the ordinance as circumstances warrant. So now, no notice being practicable, we just look to the five day provision. This period of time is unreasonable. It does not take into consideration the fact that duly licensed dogs may lose their tags after straying; that they may, and do, break their collars thereby losing their tags; that strangers may remove either collar or tag; that dogs may escape from enclosed pens, or get out of the houses of their owners (where they are not required to wear tags) and wander far afield. It does not take into consideration the not-unusual cases of theft of valuable, registered dogs. It does not take into consideration the size of the city of Los Angeles with its five pounds, and four private shelters, and nineteen pounds and animal shelters in Los Angeles County, or the fact that the owner of the dog might be out of the city when his dog escapes from his home and the person caring for it, or from a kennel where he has left it to be cared for.

The majority, in placing its approval upon this five day period, has failed to consider that when a dog is missing, the owner assumes, often correctly, that the dog will come home the next day and therefore does nothing for a one day period; that the dog may be a "wanderer" who has always returned from his prior wanderings; and that dogs do not seek the nearest pound, or shelter, upon running away. No consideration is given to the obvious fact that the owner of the dog may advertise for his lost pet, that he may for the first few days of the dog's absence call at the pounds and shelters with no success, only to have the dog picked up later when he has started to advertise for its return. In my opinion, due process of law re-

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quires that the ordinance provide for some type of notice in cases where the dog is not wearing a license tag. That notice could be by newspaper advertisement, giving the description of the dogs impounded, or by radio announcement, or by posting descriptions in various places throughout the city.

The ordinance here involved is, in my opinion, unconstitutional in that it constitutes a taking of property without due process of law as the Courts have defined that guarantee in both the Constitution of the United States and of California.

I would therefore reverse the judgment.

CARTER, J."

A petition for rehearing was filed on March 7, 1953, and denied on March 19, 1953.

Where a statute is challenged as unconstitutional and the State denies the challenge under the Fourteenth Amendment to the Constitution of the United States, Title 28, Section 1257, authorizes an appeal to the Supreme Court of the United States.

MORRIS LAVINE,
Attorney for the Appellant Petitioners.

Cases Believed to Sustain Jurisdiction

Every dog is entitled to his day in court on adequate notice.

Notice and an opportunity to be heard are the first essentials of due process of law.

Powell v. *Alabama*, 237 U. S. 45; 77 L. Ed. 158.

The statute itself must provide for the notice or it is fatally defective.

People v. *Broad*, 216 Cal. 1;
H. Moffatt Co. v. *Hecke*, 68 Cal. App. 35, 228 P. 546;
Beck v. *Ransome-Crummey Co.*, 42 Cal. App. 674.

It is an undisputable proposition that a notice which is too short to be reasonable and adequate for the purpose does not constitute due process of law.

Roller v. *Holly*, 176 U. S. 398, 402;
Marx v. *Ebner*, 180 U. S. 314;
Roberts v. *Jacobs*, 154 Cal. 307.

MORRIS LAVINE,
Attorney for Appellant Petitioners.

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APPENDIX "A"

ADVANCE CALIFORNIA REPORTS

Cases Determined in the Supreme Court

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IN THE SUPREME COURT OF CALIFORNIA

[L. A. No. 21945. In Bank. Feb. 20, 1953]

EVA SIMPSON et al., Appellants, v. THE CITY OF LOS ANGELES et al., Defendants and Respondents; MEDICAL RESEARCH ASSOCIATION (a Corporation) et al., Interveners and Respondents

[On hearing after decision by the District Court of Appeal, Second Appellate District, Division One, Civ. No. 18529 (109 A.C.A. 221, 240 P.2d 647) reversing with directions judgment of the superior court. Judgment affirmed.]

Appeal from a judgment of the Superior Court of Los Angeles County. Clarence M. Hanson, Judge. Affirmed.

Action to restrain enforcement of a city ordinance relating to surrender of unclaimed impounded animals for purpose of medical research. Judgment for defendants affirmed.

Brooks Gifford and Morris Lavine for Appellants.

Ray L. Chesebro, City Attorney, William H. Neal and Bourke Jones, Assistant City Attorneys, and Alan G. Campbell, Deputy City Attorney, for Defendants and Respondents.

Musick & Burrell, Howard Burrell, James E. Bednar, Stephens, Jones & La Fever, Raymond W. Stephens, McGinley & Hanson and John P. McGinley for Interveners and Respondents.

GIBSON, C. J.—Plaintiffs seek to restrain defendant city and two officials from carrying into effect subsection (h) of

section 53.11 of a Los Angeles city ordinance[1] which provides, in part, that the Department of Animal Regulation shall surrender unclaimed animals which have been impounded for five days to reputable institutions of learning, hospitals and laboratories that have been certified by the city health officer as organizations which will use animals humanely for the good of mankind in medical research. General demurrers were sustained with leave to amend. Plaintiffs failed to amend, and judgment was thereafter entered in favor of defendants.

The complaint alleges that three of the plaintiffs are resident taxpayers who own dogs licensed by the city, that the fourth plaintiff resides in adjacent unincorporated territory and owns a dog licensed by the county, that these dogs have recently become estrays without fault on the part of their

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[1] The ordinance is known as the Los Angeles Municipal Code. Subsection (h) provides: "Whenever any reputable institutions of learning, hospitals, research laboratories or their allied institutes in the City of Los Angeles shall make application to the Health Officer of the City of Los Angeles for permission to use humanely unclaimed impounded animals for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease, the Health Officer, on being satisfied that the said animals are to be so used, shall, from time to time, certify to the Department of Animal Regulation the names and addresses of said institutions of learning, hospitals, research laboratories and their allied institutes which he is satisfied will use animals humanely for the purposes above specified.

"It shall be the duty of the Department of Animal Regulation to surrender unclaimed impounded animals for such uses only when applied for by the institutions of learning, hospitals, research laboratories and their allied institutes which have been certified by the Health Officer as herein provided. No animal shall be surrendered except as authorized by law.

"In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days.

"No animal shall be surrendered for medical research, the owner of which has turned over such animal to the Department of Animal Regulation for destruction. Any such request for destruction of an animal by the owner thereof shall be complied with by the Department.

"The Department of Animal Regulation shall adopt and enforce rules and regulations providing for the care of animals so surrendered comparable to Supplement 211 Public Health Reports, 1949, Federal Security Agency, entitled, 'Care of the Dog Used in Medical Research.'"

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respective owners and that plaintiffs have made due and diligent inquiry but have been unable to locate their pets. There is no allegation as to what happened to the dogs, but it is alleged that they are subject to seizure and impounding by the Department of Animal Regulation and that defendants threaten to enforce subsection (h) of section 53.11 and to surrender unclaimed impounded dogs for medical research. It is contended that this portion of the ordinance is invalid because of asserted irregularities in connection with the election at which it was adopted, that it conflicts with state law, that its enforcement will deprive plaintiffs of their dogs without due process of law and constitute an unlawful taking of private property, and that it provides for a gift of public property. It is also asserted that the ordinance improperly vests uncontrolled discretion in the health officer and permits him to discriminate arbitrarily between research institutions and that it is invalid as special legislation because it grants privileges to a limited class of institutions.

[1] A preliminary question has been raised as to plaintiff's right to bring the action, but it is sufficient to note that the complaint alleges that three of the plaintiffs are resident citizens and taxpayers of the city and that enforcement of the ordinance will result in unlawful expenditures of municipal funds. As such taxpayers, they are entitled to sue to prevent the alleged illegal expenditures. (Code Civ. Proc., § 526a; *Clouse* v. *City of San Diego*, 159 Cal. 434, 438 [114 P. 573]; *Wirin* v. *Horrall*, 85 Cal. App. 2d 497, 504-505 [193 P. 2d 470]; see *Crowe* v. *Boyle*, 184 Cal. 117, 152 [193 P. 111]; *Yarnell* v. *City of Los Angeles*, 87 Cal. 603, 610 [25 P. 767].)

In support of their claim that subsection (h) was not legally adopted, plaintiffs allege that the opponents of the measure followed instructions from an assistant city attorney that any printed arguments which the opponents desired to have mailed to the voters with the sample ballots must be on newsprint of a specified size and that no rotogravure would be allowed. Plaintiffs complain that the city clerk permitted proponents of the measure to use leaflets of a larger size which were processed by rotogravure

on slick paper, and that as a result a substantial number of voters cast their votes in favor of the measure because of the more attractive appearance of proponents' arguments. [2] Courts are reluctant to defeat the fair expression of popular will in elections and will not do so unless required by the plain mandate of the law. (See *Davis* v. *County of Los Angeles*, 12 Cal. 2d 412, 426-427 [84 P.2d 1934]; *In re East Bay Etc. Water Bonds of 1925*, 196 Cal. 725, 744 [239 P. 38]; *Rideout* v. *City of Los Angeles*, 185 Cal. 426, 430 [197 P. 74].) [3] It is asserted by defendants, and not disputed by plaintiffs, that the arguments were prepared pursuant to sections 275 and 289 of the Los Angeles City Charter, which provide that the clerk shall prescribe the form of printing and the character of paper to be used. There is no allegation in the complaint that the city clerk acted improperly or that he was aware of the instructions assertedly given to the opponents of the measure by the assistant city attorney. Moreover, it does not appear that the assistant city attorney had any authority to bind the city by giving such instructions. It follows that the matters complained of do not constitute grounds for invalidating the adoption of the measure.

Plaintiffs also allege that the argument of the proponents which was mailed to the voters failed to conform with the provisions of section 343 of the Election Code of the City of Los Angeles. The complaint, however, does not quote the language of the section or state its effect, nor does it give the title or date of passage. (See Code Civ. Proc., § 459.) [4] We cannot take judicial notice of city ordinances. (See *City of Oakland* v. *Brock*, 8 Cal.2d 639, 641 [67 P.2d 344].) [5] Under the circumstances the pleading is insufficient. (*City of Tulare* v. *Hevren*, 126 Cal. 226, 229-231 [58 P. 530].)

The next question is whether the portion of the ordinance under attack is invalid because of asserted conflicts with state laws. [6] In our opinion, the licensing, impounding and disposition of dogs is not exclusively a municipal affair, and, therefore, if there is any conflict between the ordinance and the state law, the latter will prevail. (Const., art. XI, § 11; see *Eastlick* v. *City of Los Angeles*, 29 Cal.2d 661, 666; [177 P.2d 558, 170 A.L.R. 225]; *In re Portnoy*, 21 Cal.2d

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237, 239-240 [131 P.2d 1]; *Pipoly* v. *Benson*, 20 Cal.2d 366, 370-371 [125 P.2d 482, 147 A.L.R. 515].) [7] The city, however, under its police power, may enact local measures which do not conflict with general statutes. (Const., art. XI, § 11.)

[8] Sections 391 to 403 of the Agricultural Code do not operate to invalidate the ordinance. The code sections regulate the seizure and disposition of estrayed stock and domestic animals generally, and it is expressly provided that nothing therein shall affect municipal regulations regarding estrays. (Agr. Code, § 400.) [9] Similarly there is no inconsistency between subsection (h) and another general law which relates to the running at large of dogs and the protection of livestock and provides for the licensing, impounding and disposition of dogs. (1 Deering's Gen. Laws, Act 384; Stats. 1921, p. 1306, as amended.) Subsection (h) will, of course, be read as applying only to dogs which have been lawfully impounded, and the statute expressly recognizes the power of local bodies to provide for "the killing in some humane manner or other disposition of" lawfully impounded dogs. (1 Deering's Gen. Laws, Act 384, § § 6, 7.5.)

[10] Sections 597, 599b and 599c of the Penal Code which define and prohibit cruelty to animals are applicable generally throughout the state, but they do not occupy the field in which the ordinance operates, and there is nothing therein which conflicts with their provisions. [11] Section 599c of the Penal Code provides that nothing in the sections relating to cruelty to animals shall be construed as "interfering . . . with properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college or university of this state. It thus appears that the basic purpose of section 599c is to limit the effect of the provisions prohibiting cruelty to animals rather than to regulate the disposition of impounded animals. The section does not purport to designate all the institutions which may receive such animals for experimental purposes or to forbid experimentation by other than those it names, and it cannot reasonably be said that the Legislature intended to indicate

that proper and humane experiments can be conducted only under the authority of the faculty of a regularly incorporated medical college or university. [12] While it is true that, under the ordinance, research institutions other than medical colleges or universities may receive animals for experimental purposes, this obviously does not conflict with the Penal Code prohibition of cruel or improper experiments. Instead, as we have seen, it is specifically provided that the hospitals or research institutions which receive dogs must have been certified as organizations which will use them "humanely . . . for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease." Our conclusion in this connection is strengthened by sections 1650 to 1677 of the Health and Safety Code, enacted in 1951, which provide for state regulation of the use of animals for medical research. Sections 1651 and 1667 permit such use by any "person . . . laboratory, firm, association, corporation, copartnership, and educational institution," upon compliance with certain rules, and section 1670 expressly provides that nothing in this chapter shall be construed to limit or restrict the right of cities to adopt or enforce ordinances regulating the use or procurement of animals for medical research.

We come next to plaintiffs' contention that enforcement of the ordinance will deprive them of their property without due process of law. [13] It is well settled that the licensing of dogs and the regulation of the manner in which they shall be kept and controlled are within the legitimate sphere of the police power, and that statutes and ordinances may provide for impounding dogs and for their destruction or other disposition. (*Hofer* v. *Carson*, 102 Ore. 545 [203 P. 323, 326]; see *In re Ackerman*, 6 Cal. App. 5, 13-14, 16-17 [91 P. 429]; *Sentell* v. *New Orleans & C. R. Co.* (1897), 166 U. S. 698 [17 S. Ct. 693, 695-696, 41 L. Ed. 1169]; 8 A.L.R. 67, 74-76; 2 Am.Jur. 719, 721, 799.) The complaint does not attack the right of the city to provide for the impounding of stray dogs or for the disposition of impounded dogs by such methods as are covered by other portions of section 53.11 of the ordinance, namely sale, destruction, or gift to

the armed forces, but plaintiffs assert that the surrender of animals for medical research pursuant to the ordinance amounts to an unlawful taking of private property. [14] It is clear, however, that when dogs have been lawfully impounded under the police power and have become subject to disposition under the terms of the ordinance by any of the means noted above, private property rights in such dogs must, in the interest of public welfare, be treated as having been terminated.

[15] Plaintiffs also contend that subsection (h) is invalid because it does not contain any provision for notice to the owner of an impounded dog. This subsection provides that "no animal shall be surrendered [for medical research] except as authorized by law" and that "in order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days." Under subsection (b) [2] the owner, if known, must be notified in every case where a dog is impounded, regardless of the proposed method of disposing of the animal, and the city must act to give such notice within one day after the dog is impounded. The provision of subsection (h) that no animal shall be surrendered except as authorized by law clearly contemplates and requires compliance with all other applicable subdivisions, including the notice provisions of subsection (b). The courts, whenever possible, adopt that interpretation of a statute which will render it constitutional, and, therefore, the subsections should be read together for the purpose of avoiding any question of invalidity arising from the lack of a specific notice requirement in subsection (h).

When considered together the subsections require that the city must act to give notice to the owner, if known,

---

[2] Subsection (b) provides: "In the case of dogs, the Department of Animal Regulation shall hold such animal for a period of one (1) day after the impounding of such animal, during which time the owner of said animal, if known, shall be notified, after which time said animal may be sold by an officer of the Department in the same manner as provided in this Section for the sale of other animals except that notice of sale need be posted for only two (2) days in the places named in this section."

within one day after a dog is impounded and that the owner must have at least five days after receipt of such notice in which to reclaim the animal. [16] Subsection (b) does not specify the method by which the owner shall be notified of the impounding, and since there is nothing elsewhere in the ordinance to indicate that any particular form of notice is contemplated, the owner, under the authorities, is entitled to actual notice. (See *Colgear* v. *Tobriner*, 7 Cal.2d 735, 743 [62 P.2d 741, 109 A.L.R. 191]; *Johnson* v. *Barreiro*, 59 Cal. App. 2d 213, 218 [138 P.2d 746]; *cf. Stockton Automobile Co.* v. *Confer*, 154 Cal. 402, 408 [97 P. 881]; *Long* v. *Chronicle Pub. Co.*, 68 Cal. App. 171, 179 [228 P. 873]; *Alphonzo E. Bell Corp.* v. *Listle*, 55 Cal.App.2d 300, 306 [130 P.2d 251].) We need not speculate as to the possible methods by which actual notice may be given to a known owner, since we may assume that the city will proceed in a manner sufficient to meet all requirements of law. The provision of subsection (h) that, "in order to give the owners . . . time within which to reclaim the same," no animal shall be surrendered for medical research until it has been impounded for "at least five days" was obviously intended to afford an owner ample opportunity to reclaim his animal, and in our opinion the subsections should be construed as providing that the five day period does not begin to run against a known owner until he has received actual notice of the impounding. So construed, the ordinance affords adequate notice to an owner whose identity is known.

[17] If a dog is wearing a license tag as required by section 53.15 et seq. of the ordinance, the name and address of its owner will be available to the Department of Animal Regulation so that notice may be given. By prescribing a system of licenses and requiring dogs to wear a numbered tag at all times when at large on the streets, the city has done all it can to make sure that it will know the owner's identity. The tag requirement is reasonable, and an owner can insure his getting notice in all but exceptional cases by complying with the ordinance. If a dog is not wearing a license tag when impounded, its owner will not have any ground to complain of a failure to receive notice, because the ordinance places upon him the duty to make sure that

the dog wears its license tag at all times except when it is indoors or in an enclosed yard or pen. (Ordinance, § 53.23.) In view of the foregoing it is unnecessary for us to consider whether an ordinance of this type would be invalid if it did not contain a provision for notice. (See *Sentell* v. *New Orleans & C. R. Co.* (1897), 166 U.S. 698, 704-706 [17 S. Ct. 693, 695-696, 41 L. Ed. 1169]; and cases cited in 8 A.L.R. 67, 74-76.)

[18] There is no merit to plaintiffs' contention that the ordinance deprives them of their property without a hearing. Section 53.13 provides that an owner may redeem an impounded animal upon payment of certain fees and charges, and section 53.12, which sets forth the charges to be collected by the Department of Animal Regulation, states that "No fees whatsoever shall be charged or collected for or on account of any animal which has been unlawfully taken up or impounded, and any such animal shall be immediately delivered upon demand therefor to the owner or person entitled to the custody thereof." The ordinance thus contemplates that a factual or mixed factual and legal determination shall be made by the department, and under these circumstances it must be interpreted to provide for a hearing, when requested by the owner, upon the question of whether a dog has been legally seized. (*Cf. Fascination, Inc.* v. *Hoover*,[3] 39 Cal.2d 260, 268-271 [246 P.2d 656].) If, on the other hand, the owner of a dog concedes the legality of the impounding and fails to redeem the dog or to exercise his right under the subsection to demand that the dog be destroyed rather than turned over for medical research, there is no further need for a hearing.

[19] The surrender of impounded, unclaimed animals to private research laboratories and institutions is not a gift of public property within the meaning of sections 22 and 31 of article IV of the California Constitution, since the animals are to be used for a public purpose. (*Cf. California Emp. Stab. Com.* v. *Payne*, 31 Cal.2d 210, 216 [187 P.2d 702]; *County of Los Angeles* v. *La Fuente*, 20 Cal.2d 870, 877 [129 P.2d 378]; *County of Alameda* v. *Janssen*, 16

[3] Advance Report Citation: 39 A.C. 271, 279-282.

Cal.2d 276, 281-282 [106 P.2d 11, 130 A.L.R. 1141].) [20] Under the terms of the ordinance animals may be turned over only to such institutions as will use them "for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease," and the Health and Safety Code expressly recognizes that "public health and welfare depend on the humane use of animals" for medical research. (Health & Saf. Code, § 1650.) Under these circumstances the fact that private laboratories may derive some incidental benefit from the use of the animals is immaterial. (*California Emp. Stab. Com.* v. *Payne*, *supra*, 31 Cal.2d 210, 216; *County of Alameda* v. *Janssen*, *supra*, 16 Cal. 276, 281.)

[21] Another ground of asserted unconstitutionality is that the city health officer is invested with uncontrolled arbitrary discretion to determine which institutions are qualified to receive impounded animals for purposes of medical research. As we have seen, however, the ordinance describes the kinds of institutions which may apply for unclaimed animals and provides that the health officer is to certify any reputable organization on being satisfied that the animals will be used humanely for the specified purposes. In our opinion this constitutes a sufficient standard for the guidance of the city health officer. It is obviously unnecessary for the ordinance to define what constitutes a reputable institution or a humane use of animals, and in view of the number and variety of medical experiments involving the use of animals and the rapid changes in medical science this appears to be a situation in which the broad type of standard set forth in the ordinance is appropriate. (*Cf. Caminetti* v. *Pacific Mut. L. Ins. Co.*, 22 Cal. 2d 344, 364 [139 P.2d 908]; *Butterworth* v. *Boyd*, 12 Cal. 2d 140, 148-149 [82 P.2d 434, 126 A.L.R. 838]; *Gaylord* v. *City of Pasadena*, 175 Cal. 433, 439-440 [166 P. 348].)

[22] The final objection is that subsection (h) is special legislation which discriminates in favor of some institutions and denies equal protection to others because the city health officer is empowered to certify only certain types of institutions and only those located within the city of Los Angeles. However, the organizations which the health officer is au-

thorized to certify are reputable institutions of learning, hospitals and laboratories which will use animals humanely in medical research for the good of mankind. This classification is designed properly for the promotion of the general health and welfare of the public. Nor is there anything improper in restricting the institutions which may receive animals to those which are located within the city of Los Angeles. Since the city health officer may certify only those institutions which he is satisfied will use animals for the designated purpose, it is not unreasonable to confine his investigations to organizations which are within the city limits.

The judgment is affirmed.

Shenk, J., Traynor, J., Spence, J., and Van Dyke, J. pro tem., concurred.

CARTER, J.—I dissent.

I cannot agree with the construction placed by the majority on the sections of the ordinance in question or that the notice provisions contained in those sections are sufficient to afford due process of law. Subsection (b) of section 53.11 provides that an owner must be notified within one day after a dog is impounded and that the animal may be *sold* thereafter if notice of sale is posted for two days; under subsection (h) it is provided that no dog may be *surrendered to a certified institution for experimental purposes* unless it has been impounded for at least five days. The majority of this court indulges in some legerdemain in the field of judicial legislation and comes up with the startling result that these two sections must be read together: that the one day notice provision in subsection (b) applies to subsection (h). By reading them together, the majority rewrites the ordinance so that it provides that an owner has five days after *receipt* of *actual notice* in which to reclaim his dog before it is surrendered for experimental purposes. This is done, we are informed, "for the purpose of avoiding any question of invalidity *arising from the lack of a specific notice requirement in subsection (h).*" Using reasoning such as this, *any* statute could be "interpreted" in such a way as to render it constitutional.

The *only* notice provision applies to dogs about to be *sold*. There is no notice provision in the subsection providing for surrender of such dogs for experimental purposes. The sale of a dog and its surrender for experimental purposes are two entirely different things and there is no basis in logic for the statement of the majority that these two subsections must be read together and that the notice provision of the sale subsection applies to the surrender subsection. Subsection (b) deals specifically and exclusively with the sale of impounded dogs; subsection (h) deals only with the surrender of unclaimed, impounded animals for experimental purposes. The only provision of subsection (h) of section 53.11 which could possibly be construed as providing for any notice is that which reads: "In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days." But we are informed by the majority that subsection (b) which provides that the owner of the animal, if known, shall be notified within a period of one day, applies "regardless of the proposed method of disposing of the animal." We are told that this means "actual notice" but that "We need not speculate as to the possible methods by which actual notice may be given to a known owner, since we may assume that the city will proceed in a manner sufficient to meet all requirements of law." The subsection provides that the Department of Animal Regulation "shall *hold* such animal *for a period of one (1) day after the impounding of such animal, during which time* the owner of said animal, if known, shall be notified, *after which time said animal may be sold. . . .*" (Emphasis added.)

The notice provision in subsection (b) which is to be read into subsection (h) does not take into consideration the fact that even if the name of the registered owner appears on the license tag, that one day's mailed notice in the city of Los Angeles is unreasonable and insufficient. It is pointed out in the briefs, that due to the present condition of the mail delivery service, it usually takes two days for ordinary mail to reach its addressee who resides within the city limits. It

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does not take into consideration the fact that the owner of the dog may not have a telephone; that the owner of the dog might be out of town. It does not take into consideration the length of time it might take an employee of the particular pound in question to ascertain, from the Department of Animal Regulation, the full name, address, telephone number, etc. of the owner of the dog. And, it should not be overlooked that the majority, in construing the notice required to be actual notice received by the owner, *has* overlooked the provision of the subsection which provides, by the use of mandatory language, that the animal shall be held for one day, during which time the owner shall be notified, and that *after* that time, the animal may be sold after posting notice of sale for two days. *This section provides for a three day period at the most before an impounded animal may be sold.* It should be noted, in this respect, that the posted notices are to be placed at (1) the public pound; (2) the city hall; (3) the central police station. There are five public pounds in Los Angeles. At which one is the notice to be posted?

I cannot understand how the one day provision in subsection (b) can possibly be construed to mean that the owner of the dog must be given actual notice which must be received and that he thereafter (subsection (h)) has five days within which to reclaim his dog. However, by such reasoning, a majority of this court, has now placed the constitutional stamp of approval upon the ordinance. In my opinion the notice provisions are insufficient to afford due process of law.

In judging what is due process of law, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand, respect being had to the cause and object of the taking (*Wulzen* v. *Board of Supervisors*, 101 Cal. 15 [35 P. 353, 40 Am. St. Rep. 171]; *Imperial Water Co.* v. *Board of Supervisors*, 162 Cal. 14 [120 P. 780]). While it is impossible to define with precision "due process of law" it means, broadly speaking, that before a man's property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard. It means further that the notice shall be a real and reasonable one,

and the hearing, such as is ordinarily, or at least reasonably, given in similar cases (*Beck* v. *Ransome-Crummey Co.*, 42 Cal. App. 74 [184 P. 431]). Particularly applicable here is the statement found in *People* v. *Broad*, 216 Cal. 1 [12 P. 2d 941], where this court said "... the essential validity of the law was to be tested not by what has been done under it, but what may by its authority be done; and where a statute makes no provision for hearing or notice, either actual or constructive, *such defect is not supplied by the voluntary adoption by public officers of rules covering the situation.*" In *Roller* v. *Holly*, 176 U.S. 398, 409 [20 S. Ct. 410, 44 L. Ed. 520], it was said "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose (*Davidson* v. *New Orleans*, 96 U.S. 97 [24 L. Ed. 616]; *Hagar* v. *Reclamation District*, 111 U.S. 701-712 [4 S.Ct. 663, 28 L. Ed. 569])." In that case, it was held (413) that "Without undertaking to determine what is a reasonable notice to nonresidents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law. ..." The Roller case was followed in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [70 S. Ct. 652, 94 L. Ed. 865], where it was said "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality *is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections*, *Milliken* v. *Meyer*, 311 U.S. 457 [61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357]; *Grannis* v. *Ordean*, 234 U.S. 385 [34 S. Ct. 779, 58 L. Ed. 1363]; *Priest* v. *Las Vegas*, 232 U.S. 604 [34 S. Ct. 443, 58 L. Ed. 751]; *Roller* v. *Holly*, 176 U.S. 398 [20 S. Ct. 410, 44 L. Ed. 520]. The notice must be of such nature as rea-

sonably to convey the required information, *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance. . . . But when notice is a person's due, process which is a mere gesture is not due process." And in *Griffin* v. *Griffin,* 327 U.S. 220, 228 [66 S. Ct. 556, 90 L. Ed. 635], it was said "It is plain in any case that a judgment *in personam* directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the State's power over him, without some form of notice by personal or substituted service. *Wuchter* v. *Pizzutti,* 276 U.S. 13, 18-20 [48 S. Ct. 259, 72 L. Ed. 446]; Restatement of Conflict of Law, § 75; and compare *Milliken* v. *Meyer,* 311 U.S. 457 [61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357]. *Such notice cannot be dispensed with even in the case of judgments in rem with respect to property within the jurisdiction of the court rendering the judgment. Roller* v. *Holly,* 176 U. S. 398, 409 [20 S. Ct. 410, 44 L. Ed. 520]." (Emphasis added.)

If the dog is not wearing a license tag, the majority says that "its owner will not have any ground to complain of a failure to receive notice, because the ordinance places upon him the duty to make sure that the dog wears its license tag at all times except when it is indoors or in an enclosed yard or pen." Apparently we now forget about the one day notice, actual and received, and the dog is held for the prescribed (subsection (h)) period of five days before being surrendered to a hospital or institution for experimental purposes. Under reasoning of the type indulged in by the majority, we can read the ordinance as circumstances warrant. So now, no notice being practicable, we just look to the five day provision. This period of time is unreasonable. It does not take into consideration the fact that duly licensed dogs may lose their tags after straying; that they may, and do, break their collars thereby losing their tags; that strangers may remove either collar or tag; that dogs may escape from enclosed pens, or get out of the houses of their owners (where they are not required to wear tags) and wander far afield. It does not take into consideration the not-unusual cases of theft of valuable, regis-

tered dogs. It does not take into consideration the size of the city of Los Angeles with its five pounds, and four private shelters, and 19 pounds and animal shelters in Los Angeles County, or the fact that the owner of the dog might be out of the city when his dog escapes from his home and the person caring for it, or from a kennel where he has left it to be cared for.

The majority, in placing its approval upon this five day period, has failed to consider that when a dog is missing, the owner assumes, often correctly, that the dog will come home the next day and therefore does nothing for a one day period; that the dog may be a "wanderer" who has always returned from his prior wanderings; and that dogs do not seek the nearest pound, or shelter, upon running away. No consideration is given to the obvious fact that the owner of the dog may advertise for his lost pet, that he may for the first few days of the dog's absence call at the pounds and shelters with no success, only to have the dog picked up later when he has started to advertise for its return. In my opinion, due process of law requires that the ordinance provide for some type of notice in cases where the dog is not wearing a license tag. That notice could be by newspaper advertisement, giving the description of the dogs impounded, or by radio announcement, or by posting descriptions in various places throughout the city.

The ordinance here involved is, in my opinion, unconstitutional in that it constitutes a taking of property without due process of law as the courts have defined that guarantee in both the Constitution of the United States and of California.

I would therefore reverse the judgment.

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JUN 27 1953
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 151

EVA SIMPSON, BETTY BURRELL AND GRACE PROUDFOOT, INDIVIDUALLY, AND AS TAXPAYERS OF THE CITY OF LOS ANGELES, AND ON BEHALF OF ALL OTHER TAXPAYERS OF THE CITY OF LOS ANGELES, AND FRANCES STANCLIFF, *Appellants,*

vs.

THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, GEORGE M. UHL, RICHARD F. BONNER, COLLEGE OF MEDICAL EVANGELISTS, A NON-PROFIT CORPORATION, MEDICAL RESEARCH ASSOCIATION OF CALIFORNIA, A NON-PROFIT CORPORATION, CEDARS OF LEBANON HOSPITAL, A NON-PROFIT CORPORATION, HARRY GOLDBLATT, M. D., INDIVIDUALLY AND AS A TAXPAYER OF THE CITY OF LOS ANGELES, AND UNIVERSITY OF SOUTHERN CALIFORNIA, A NON-PROFIT ASSOCIATION, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AGAINST JURISDICTION ON APPEAL AND MOTION TO DISMISS OR AFFIRM

ROGER ARNEBERGH,
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WILLIAM H. NEAL,
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INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
The facts presented	2
Argument	3

Table of Cases Cited

Coleman v. *Miller*, 307 U.S. 433, 83 L. ed. 1385	4
De Saussure v. *Gaillard*, 127 U.S. 216, 32 L. ed. 125	4
Fairchild v. *Hughes*, 258 U.S. 126, 66 L. ed. 499	4
Frothingham v. *Mellon*, 262 U.S. 447, 67 L. ed. 1078	4
Harrington v. *California*, 314 U.S. 582, 86 L. ed. 471	4
McCandless v. *Pratt*, 211 U.S. 437, 53 L. ed. 271	4
New York State Voters League, etc., v. *Hilleboe*, 202 Misc. 687, 114 N.Y.S. (2d) 805	5
Nicchia v. *New York*, 254 U.S. 228, 65 L. ed. 235	4
Oklahoma Tax Commission v. *Texas Co.*, 336 U.S. 342, 93 L. ed. 731	5
Santell v. *New Orleans & C. R. Co.*, 166 U.S. 698, 41 L. ed. 1169	4
Simpson v. *City of Los Angeles*, 40 A.C. 275	2, 3
Stark v. *Wickard*, 321 U.S. 288, 88 L. ed. 733	4
State v. *Moresi*, 209 La. 180, 24 So. (2d) 370	5
United Public Workers v. *Mitchell*, 330 U.S. 75, 91 L. ed. 754	4
Winters v. *New York*, 333 U.S. 507, 92 L. ed. 840	5

Statute Cited

Los Angeles Municipal Code, Sections 53.00 to 53.37	5

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 151

EVA SIMPSON, BETTY BURRELL AND GRACE PROUDFOOT, INDIVIDUALLY, AND AS TAXPAYERS OF THE CITY OF LOS ANGELES, AND ON BEHALF OF ALL OTHER TAXPAYERS OF THE CITY OF LOS ANGELES, AND FRANCES STANCLIFF, *Appellants,*

vs.

THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, GEORGE M. UHL, RICHARD F. BONNER, COLLEGE OF MEDICAL EVANGELISTS, A NON-PROFIT CORPORATION, MEDICAL RESEARCH ASSOCIATION OF CALIFORNIA, A NON-PROFIT CORPORATION, CEDARS OF LEBANON HOSPITAL, A NON-PROFIT CORPORATION, HARRY GOLDBLATT, M. D., INDIVIDUALLY AND AS A TAXPAYER OF THE CITY OF LOS ANGELES, AND UNIVERSITY OF SOUTHERN CALIFORNIA, A NON-PROFIT ASSOCIATION, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AGAINST JURISDICTION ON APPEAL AND MOTION TO DISMISS OR AFFIRM

May It Please the Court:

The appellees respectfully show the following in opposition to the appellants' assertion of the jurisdiction of the

Supreme Court of the United States, and in support of the appellees' motion to dismiss or affirm:

I

The Facts Presented

By detailed provisions of the Municipal Code of the City of Los Angeles, one harboring a dog within the city limits must secure a permit or license: the only exceptions are for transients, for owners of mere puppies, and for operators of kennels otherwise licensed. A permit to harbor a dog is evidenced by a metal license tag which must be securely fastened to the dog's collar whenever it is off its owner's premises.

No one may permit a dog to run at large within the city; every dog must either be confined upon its owner's premises or be restrained by a leash.

Animals may be impounded by the City Department of Animal Regulation for various reasons, such as that they are objects of abuse or neglect, or are dangerously infected with disease, or that they are found wandering at large. There are various provisions for the disposition of impounded animals: they may be reclaimed by an owner, they may be sold, they may be destroyed, they may be delivered to the armed forces or they may be delivered to research institutions for purposes beneficial to mankind.

The latter provision for the disposition of unclaimed impounded animals was added to the Municipal Code by decision of the electors of the city upon referendum. It is of this provision alone that the appellants complain.

The appellees' demurrer to the appellants' complaint in the Superior Court of the State of California was sustained with leave to amend. The appellants failed to amend, and judgment for the appellees was entered. That judgment was affirmed (*Simpson* v. *City of Los Angeles*, 40 A.C. 275).

The facts presented are therefore those which appear in the complaint, as construed and applied by the Supreme Court of California in its opinion affirming the judgment; and since the appellants failed, with leave, to enlarge upon those facts by amendment, they are in no position here to seek an enlargement by surmise or conjecture. All of the intendments were for the ordinance in the state courts, all intendments now are for the judgment.

The appellants seek to raise various questions asserted to be federal in their jurisdictional statement. Only one of these has even a color of apparent substance—the claim that the appellants are being deprived of property without due process of law.

II

Argument

A. Upon the facts presented the appellants have no standing to raise this or any other question before this Court.

B. Under prior decisions of this Court as to the nature of property rights in dogs, no substantial federal question could be made to appear here.

C. As the ordinance is construed and applied by the opinion of the Supreme Court of California, due process fully appears.

D. The appellants have not complied with the rules of this Court and the purported appeal is therefore irregular and invalid.

Point A. None of the appellants is the owner of a dog in the possession of any of the respondents. The sole basis for their standing to attack the ordinance in question, as stated in the opinion of the Supreme Court of California (*Simpson* v. *City of Los Angeles*, 40 A.C. 275, 280, 281) is that three of them are resident citizens and taxpayers of

the city and that as such they were entitled to sue to prevent alleged illegal expenditures in connection with the administration of the ordinance. Such is purely a state question and the decision of the state court thereon forecloses any inquiry here.

McCandless v. *Pratt*, 211 U. S. 437, 441-445 53 L. Ed. 271, 273, 274.

See also:

United Public Workers v. *Mitchell*, 330 U. S. 75, 91 L. Ed. 754, 765-768;

Stark v. *Wickard*, 321 U. S. 288, 290, 304 88 L. Ed. 733, 737, 745;

Coleman v. *Miller*, 307 U. S. 433, 438-442, 83 L. Ed. 1385, 1388-1391;

Frothingham v. *Mellon*, 262 U. S. 447, 483-489, 67 L. Ed. 1078, 1083-1085.

cf.: *Fairchild* v. *Hughes*, 258 U. S. 126, 129, 130; 66 L. Ed. 499, 504;

DeSaussure v. *Gaillard*, 127 U. S. 216, 232-234; 32 L. Ed. 125, 131, 132.

Point B. Under prior decisions of this Court as to the nature of property rights in dogs, no substantial federal question could be made to appear here. Property rights in dogs are *sui generis* and are peculiarly subject to the exercise of the police power. Consequently, without question of constitutional conflict, state or municipal legislation under the police power may prohibit or regulate the keeping of dogs, may require dogs to be restrained, as directed, and may seize and destroy or dispose of dogs which are not licensed, kept or restrained as required.

Nicchia v. *New York*, 254 U. S. 228, 230, 231, 65 L. Ed. 235, 238;

Sentell v. *New Orleans & C. R. Co.*, 166 U. S. 698, 700-706; 41 L. Ed. 1169;

Harrington v. *California*, 314 U. S. 582, 86 L. Ed. 471.

And see:

State v. *Moresi*, 209 La. 180, 24 So. 2d 370;
N. Y. State Voters League, etc. v. *Hilleboe*, 202 Misc. 687; 114 N. Y. S. 2d 805.

Point C. As the ordinance is construed and applied by the opinion of the Supreme Court of California, due process fully appears in any event. Contrary to the appellants' entreaties the Supreme Court of California construed the contested subsection (53.11(h)) of the Los Angeles Municipal Code with provisions of the same section and related sections (sections 53.00 to 53.37). Thus construed the ordinance requires, before an unclaimed impounded dog is delivered for research, (1) that the owner be notified within one day after the dog is impounded, and (2) that the dog be thereafter kept in the pound for five days, during which its owner may claim it (p. 284).

The dissenting Justice of the Supreme Court of California took issue with such construction, contending that the ordinance ought not to be construed to require such notice, and that without such construction it appeared unconstitutional. Such a question of construction is for the state court; the appellants invite this Court to agree with the state dissenter and then to strike down the ordinance for asserted inconsistency with the Fourteenth Amendment.

Oklahoma Tax Commission v. *Texas Co.*, 336 U. S. 342, 351; 93 L. Ed. 731;
Winters v. *New York*, 333 U. S. 507, 514, 92 L. Ed. 840, 849.

Point D. The appellants have not complied with the rules of this Court and the purported appeal is therefore irregular and invalid. The opinion of the Supreme Court of California was filed February 20, 1953; rehearing was denied on March 19, 1953. Appeal was allowed by Mr.

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Justice Douglas on May 13, 1953, upon a petition filed with this Court, but copies of neither the order nor the petition have been served upon the appellees. No citation has been served upon the appellees under Rule 10, nor has any assignment of errors or statement re Rule 12(3) been served under Rule 10 and Rule 12, nor has any notice, record, brief or petition for review on certiorari been served upon the appellees under Rule 38.

Since the appellants have not complied with the rules of this Court, their purported appeal is irregular and should be dismissed.

Conclusion

Upon the foregoing the appellees respectfully move that the within appeal be dismissed or that the judgment of the Supreme Court of the State of California be affirmed.

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By ALAN G. CAMPBELL.

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No. 151

FILED
OCT 26 1953
HAROLD B. WILLEY, Cl

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

EVA SIMPSON, BETTY BURRELL and GRACE PROUDFOOT, Individually and as Taxpayers of the City of Los Angeles, and on behalf of all other taxpayers of the City of Los Angeles, and FRANCES STANCLIFF,

Plaintiffs and Appellants,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, GEORGE M. UHL, RICHARD L. BONNER, JOHN DOE 1, DOE II, DOE III, DOE IV and DOE V,

Defendants and Respondents,

and

MEDICAL RESEARCH ASSOCIATION OF CALIFORNIA, a Corporation, CEDARS OF LEBANON HOSPITAL, a corporation, HARRY GOLDBLATT, M.D., COLLEGE OF MEDICAL EVANGELISTS, a non-profit corporation, and UNIVERSITY OF SOUTHERN CALIFORNIA, a non-profit corporation,

Interveners and Respondents.

PETITION FOR REHEARING

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TOPICAL INDEX

Page

I. The Ordinance Fails to Give Notice and an Opportunity to Be Heard and Is Therefore Void on Its Face 9

Certificate of Counsel 15

TABLE OF CASES AND AUTHORITIES CITED

Cases

Angell v. Bullington, 330 U. S. 183, 189, 91 L. Ed. 837 3

Davis v. Heimbach, 75 Cal. 261 10

Ervine v. St. Board of Equalization, 40 Cal. App. (2d) 280 10

Fucelli v. American Society, 23 N. Y. State (2d) 983 10

H. Moffat Co. v. Hecke, 68 Cal. App. 35, 228 Pac. 546 ..... 9, 10

Marx v. Ebner, 180 U. S. 314 ..... 10, 14

People v. Broad, 216 Cal. 1, 12 Pac. (2) 941, 216 Cal. 1 10

People v. Grant, 52 Cal. App. (2) 794 10

Powell v. Alabama, 237 U. S. 45; 77 L. Ed. 158 14

Roberts v. Jacobs, 154 Cal. 307 ..... 10, 14

Roller v. Holly, 176 U. S. 402 ..... 11, 14

Codes

Page

General Laws (Deering Code), section 384 8

Municipal Code

Section 53.11(b) 12

Section 53.11(h) 7, 9, 11, 12

Penal Code

Section 597 8

Section 599(c) 8

Statutes

Act of Congress, Title 28, Sec. 1257, Subd. 2 2

Constitution of California

Article 1, Sections 1, 11, 13, 14, 25 ..... 4, 5, 7, 8, 12

Cottle Protection Act

Stats. 1917, Chap. 678 9

Stats. 1919, Chap. 325 9

Fourteenth Amendment to the Constitution of U. S. 2, 3, 5, 8, 12, 13, 14

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

EVA SIMPSON, BETTY BURRELL and GRACE PROUDFOOT, Individually and as Taxpayers of the City of Los Angeles, and on behalf of all other taxpayers of the City of Los Angeles, and FRANCES STANCLIFF,

Plaintiffs and Appellants,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, GEORGE M. UHL, RICHARD L. BONNER, JOHN DOE I, DOE II, DOE III, DOE IV and DOE V,

Defendants and Respondents,

and

MEDICAL RESEARCH ASSOCIATION OF CALIFORNIA, a Corporation, CEDARS OF LEBANON HOSPITAL, a corporation, HARRY GOLDBLATT, M.D., COLLEGE OF MEDICAL EVANGELISTS, a non-profit corporation, and UNIVERSITY OF SOUTHERN CALIFORNIA, a non-profit corporation,

Interveners and Respondents.

No. 151

PETITION FOR REHEARING

COMES NOW the appellants and petition for a rehearing of the order of this court of October 12th dismissing the appeal "for want of a substantial federal question."

We respectfully wish to point out that this court has apparently overlooked certain facts which are *substantial* in this case and on which we respectfully base our petition for rehearing on the ground that the questions presented are substantial and affect dog owners throughout the nation. The Act of Congress authorizing a review on appeal from a judgment of a state court upholding the Constitutionality of a statute gives appellants a *right* of appeal as distinguished from *discretion* authorized by a petition for a writ of certiorari.

It is important that a hearing be granted in this case to determine the following substantial questions:

1. Does the Act of Congress Title 28, Section 1257, Subdivision 2 entitle an appellant to an appeal as a matter of *right* where it is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity?

2. Where a state statute or city ordinance as construed by the highest court of the state to be valid provides a very short period of time so short within which notice may be given to those affected by the ordinance in the taking and confiscation of private property, to-wit—does it deprive the owner of the dog of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

3. Is a city ordinance which allows private medical laboratories located only in the city to appropriate dogs

in the city pound after they have been picked up as strays and kept there only five (5) days and permits the use of them for medical experimentation deny to all owners of dogs and to other persons and hospitals in the state and county the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

The ordinance here involved, while coming from the City of Los Angeles, is being watched by dog societies all over the country and by persons who are dog lovers as to its possible effect on legislation that is bound to be enacted and patterned after the Los Angeles City ordinance. We respectfully submit that the questions presented are therefore substantial in their nationwide effect, and that our appeal should be heard.

This Court has said in *Angel v. Bullington,* 330 U. S. 183, 189, 91 L. Ed. 837:

> "Bullington could have come here, *not merely by the grace of this Court on certiorari,* but on appeal, as did White in *White v. Hart,* 13 Wall. (U. S.) 646, 20 L. Ed. 685, supra, to challenge, successfully, the right of Georgia to limit the jurisdiction of the Georgia courts; as did the East New York Savings Bank in the recent case of *East New York Sav. Bank v. Hahn,* 326 U. S. 230, 90 L. ed. 34, 66 S. Ct. 69, 160 A. L. R. 1279, to challenge, though unsuccessfully, the limitation which New York placed upon the jurisdiction of its courts. *Cf. Kenney v. Supreme Lodge,* L. O. 252 U. S. 411, 64 L. ed. 638, 641, 40 S. Ct. 371, 10 A. L. R. 716 . . . "

We submit that the statute gave us the *right* on appeal to come to this court to determine the validity of the Los Angeles City ordinance by an appeal.

Justice Douglas allowed an appeal in this court after an examination of the papers in the case.

This case involves in approximate figures the rights of 152,000 owners of licensed dogs in the City of Los Angeles (Resp. Br., 9) who pay taxes and license fees on these dogs in the approximate sum of nearly one-half million dollars per year for the care, protection and shelter of their dogs in a humane manner.

It also involves the right of taxpayers of the City to the funds from the sale of dogs at its pounds and the payment thereafter for the benefit when sold.

Certain dogs do not have to be licensed, such as Seeing-eye that lead the blind, dogs under four months of age, Kennel dogs and dogs that may be kept on farms and are just brought into the city by their owners on a visit, etc. Their owners have a constitutional and statutory right to be protected in their ownership of property, Article 1, Section 1 Constitution of California. Certain statutes and constitutional provisions are involved in this case, and we are in accord with the request of the City of Los Angeles that "If perchance it (the ordinance) may be invalid the Appellate Court should say so now, and this question may only be determined now upon a hearing in this court." (Resp. Br. 10). We therefore make the same request.

The following constitutional provisions are involved:

Constitution of California, Article I, Section 1:

"All men are . . . and have certain inalienable rights, among which are those of . . . acquiring, *possessing,* and *protecting* property; and obtaining safety and happiness."

The Fourteenth Amendment to the Constitution of the United States:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or *property, without due process of law;* nor deny to any person within its jurisdiction the *equal protection of the laws.*"

AN ORDINANCE ADDING SUBSECTION (h) TO SECTION 53.11 OF THE LOS ANGELES MUNICIPAL CODE RELATING TO THE REGULATION OF THE SURRENDER OF UNCLAIMED IMPOUNDED ANIMALS FOR PURPOSES OF *MEDICAL RESEARCH.*

The People of the City of Los Angeles Do Ordain As Follows:

Section 1. Subsection (h) is hereby added to Section 53.11 of the Los Angeles Municipal Code, to read:

(h) Whenever any reputable *institutions of learning, hospitals, research laboratories* or their *allied institutes* in the City of Los Angeles shall make application to the Health Officer of the City of Los Angeles for permission to use *humanely*

unclaimed impounded animals for the good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease, the Health Officer, on being satisfied that the said animals are to be so used, shall, from time to time, certify to the Department of Animal Regulation the names and addresses of said institutions of learning, hospitals, *research laboratories* and their *allied institutes* which he is satisfied will use animals humanely for the purposes above specified.

It shall be the duty of the Department of Animal Regulation to surrender unclaimed impounded animals for such uses only when applied for by institutions of learning, hospitals, research laboratories and their allied institutes which have been certified by the Health Officer as herein provided. No animal shall be surrendered except as authorized by law.

In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days.

No animal shall be surrendered for medical research, the owner of which has turned over such animal to the Department of Animal Regulation for destruction. Any such request for destruction of an animal by the owner thereof shall be complied with by the Department.

The Department of Animal Regulation shall adopt and enforce rules and regulations providing for the care of animals so surrendered comparable to *Supplement 211 Public Health Reports, 1949,*

Federal Agency, entitled "Care of the Dog Used In Medical Research."

Section 53.11(h) is void on its face for the following reasons:

1. Section 53.11(h) violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States in that it fails to provide *notice* and an opportunity to be heard by the owners of seized dogs in the City of Los Angeles—whether licensed or unlicensed, before forfeiture or confiscation.

2. Section 53.11(h) is unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13, of the Constitution of California in that it provides an inadequate *time* or *method* for furnishing notice to owners of seized dogs and provides for the confiscation of private property without notice and without an opportunity to be heard adequately.

3. Section 53.11(h) is unconstitutional on its face in that it provides for the seizing of private property for a *private* use in violation of Article I, Section 14 of the Constitution of California.

4. Section 53.11(h) is unconstitutional in that it is special, partial and arbitrary legislation and denies the equal protections of the laws in permitting the giving away of dogs to *institutions of learning, hospitals, hospitals' research laboratories,* or their allied institutes in

the *City of Los Angeles* only and does not permit the same rights, privileges and opportunities to pet societies, dog loving organizations, governmental agencies, institutions for the blind, dog breeders, childrens' home or institutions either inside or *outside* of the City of Los Angeles or any medical institutions outside the city, and thus denies the equal protections of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13, of the Constitution of California, and Articles I, Sections 11 and 25 of the Constitution of California, and is special legislation violative of the foregoing sections. Under it even the University of California being outside the City of Los Angeles is barred.

5. The ordinance conflicts with State Law, Sections 597 and 599(c) of the Penal Code, and Section 384 General Laws (Deering's Code), which now cover the entire field. Section 599(c) now permits the regularly authorized faculty of a Medical University to conduct experiments and is statewide; the ordinance expands this provision and limits all its provisions to the city of Los Angeles. Thus even U.C.L.A. at Westwood, outside the City would be barred.

6. The ordinance on its face gives unlimited discretion to a local Administrator to confiscate and give away private property and give it away for a private use.

I.

THE ORDINANCE FAILS TO GIVE NOTICE AND AN OPPORTUNITY TO BE HEARD AND IS THEREFORE VOID ON ITS FACE.

Section 53.11(h), carefully analyzed, shows that it is void on its face for lack of notice, the first essential of due process of law. (*H. Moffat Co. v. Hecke,* 68 Cal. App. 35.) The Section provides for *no notice* of any kind or character, to appear in person or by publication before disposing of impounded animals. It in effect permits the city to forfeit or confiscate and then to give away the dog to a private institution after it has been impounded for a period of only five days, *without any notice either actual or constructive* of any kind or character to the owner. Such a statute is void as violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 13, of the Constitution of the State of California.

In *H. Moffat Co. v. Hecke,* 68 Cal. App. 35, 228 Pac. 546, it was held that the Cattle Protection Act, Stats. 1917, ch. 678 and the portion of the Statutes of 1919, creating the Department of Agriculture and providing that the directors of that department should succeed to and be vested with all of the powers and duties, responsibilities and jurisdiction of the Cattle Inspection Board (Stats. 1919, ch. 325) which provides that:

> "If upon such inspection cattle shall be found not belonging to the shipper all such cattle shall be *taken* by the inspector and dealt with in accordance with the rules of the board in such case made,"

but which makes no provision for notice, either actual or constructive, to the owner of the action to be had, contravenes the due process clause of the Federal Constitution and are therefore void.

A statute which fails to provide notice before property is taken or forfeited violates due process of law.

> *People v. Grant*, 52 Cal. App. (2) 794;
> *People v. Broad*, 216 Cal. 1, 12 Pac. (2d) 941.

The notice must be to someone.

> *Davis v. Heinbach*, 75 Cal. 261.

Where a statute does not provide for a notice, even the voluntary giving of notice does not remedy the defect in the act.

> *H. Moffat Co. v. Hecke*, 68 Cal. App. 35, 228 Pac. 546.

Where a license or permit is required, a fair notice is required before it can be revoked.

> *Ervine v. St. Board of Equalization*, 40 Cal. App. 2d 280.

And see: *Fucelli v. American Society*, 23 N. Y. State (2d) 983. This was a dog case.

Not only must there be notice and an opportunity to be heard, but it is an undisputable proposition that a notice which is too *short* to be reasonable and adequate for the purpose does not constitute due process of law.

Roller v. Holly, 176 U. S. 402;
Marx v. Ebner, 180 U. S. 314;
Roberts v. Jacobs, 154 Cal. 307.

It is doubtful if other Sections 53.11 Municipal Code could have any application as they refer only to stray dogs that may be sold, not those to be *given* away for purposes set out in 53.11(h).

See 53.11:

"(b) In the case of dogs, the humane department shall hold such animal for a period of one (1) day after the impounding of such animal, during which time the owner of said animal, if known, shall be notified, after which time said animal may be *sold* by an officer of the department in the same manner as provided in this section for the *sale* of other animals, except that *notice of sale* be posted only two (2) days in the places named in this section."

The places mentioned in the section are, the bulletin board of three public buildings, namely (1) at the public pound; (1) at the city hall, and (1) at the central police station.

And such notice under Section 53.11 is entirely too short and the places set out too insufficient to be *rea-*

sonable and *adequate*. One day's time is not even sufficient for a post card to reach an owner. At present day deliveries, even in the city, it generally takes *two* days for ordinary mail to reach a person. There are numerous places in the City of Los Angeles where dogs are taken when found, besides one of the five scattered pounds. There are 5 pounds in the Los Angeles area and several other places where dogs may be taken by the city. The pound is only one of them. If a person is a working person, who owns a dog, and the dog has gotten away while the owner is away it is absolutely impossible, even with diligent search, to find a dog within this short period of time.

We, therefore, challenge the constitutionality of Section 53.11(h), the ordinance which was passed by initiative, and also 53.11, particularly paragraph (b) as entirely inadequate to constitute sufficient or adequate notice to afford due process of law under the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13, of the Constitution of California.

The ordinance authorizes a health officer to give away dogs, whether *licensed* or *unlicensed*, which have not been reclaimed within *five* days *only* to institutions in the *City* of Los Angeles and *only* to those institutions of learning, hospitals, research laboratories, or allied institutes, and only such as have been certified by the health officer. Such a statute is discriminatory and denies the equal protection of the laws, and lacks

uniformity of operation. Guaranteed by the Fourteenth Amendment to the U. S. Constitution. It grants special privileges to a class, and only to a class in the *City* of Los Angeles. The dogs in question could not be given to the University of California at Berkeley, nor to Stanford University at Palo Alto or its medical college in San Francisco; nor to the California Institute of Technology; nor to the Memorial Hospital at Pasadena, which is probably the leading research institute on certain types of cancers. The Veterans Hospital at Sawtelle would also be barred but any private laboratory, chiropractic college, or other institution satisfying the city health officer would be eligible to receive the dogs for nothing.

The Los Angeles City ordinance permits only five days under any construction of the city statutes within which to locate one's dog that got lost, strayed or otherwise was found on the streets without his license tag on him. It makes the city dog catcher an advance agent to seize private pets and that have lost their identification and turn them down for masterless experimentation without compensation to the owner. It permits seizure and confiscation of private property without compensation. Considering the geographical size of the City of Los Angeles and the fact that it has various pounds scattered in that geographical area and these pounds are only open during the working hours of the day, a person's most beloved pet could be lost, without adequately adequate notice or opportunity to find it. This court has repeatedly held that shortness of notice

and fair opportunity to reacquire one's property is a denial of due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. Under California state law dogs are property and the subject of theft.

In *Powell v. Alabama,* 237 U. S. 45; 77 L. Ed. 158 the court pointed out that notice and an opportunity to defend are of the very essence of due process of law. This court has repeatedly held that notice and opportunity to be heard are of the very essence of due process of law.

Roller v. Holly, 176 U. S. 398, 402;
Marx v. Ebner, 180 U. S. 314;
Roberts v. Jacobs, 154 Cal. 307.

The ordinance also deprives citizens of the equal protection of the law in that it does not give dog lovers and the citizens throughout the city the same rights as medical laboratories located within the city itself. It gives medical laboratories for experimentation and vivisection in the city the right to come in and pick these dogs up immediately. But dog lovers are denied that same right; also other societies are denied that same right although they may be equally interested in acquiring the dogs and preserving the dogs' lives rather than using them for experimentation. We submit that each of these issued are substantial and that a petition for rehearing should be granted.

We pray for rehearing and reversal of the judgment below which sustained the constitutionality of the ordinance under the Fourteenth Amendment.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellants.

CERTIFICATE OF COUNSEL

I, MORRIS LAVINE, attorney for the appellants, hereby certify that the petition for rehearing is filed in good faith and not for the purposes of delay and is based upon grounds that the questions are substantial and that developed as a result of the dismissal of the appeal "for want of a substantial question."

MORRIS LAVINE,
Attorney for Appellants.

No. 151. SIMPSON ET AL. *v.* CITY OF LOS ANGELES ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Morris Lavine* for appellants. *Roger Arnebergh, William H. Neal, Bourke Jones* and *Alan G. Campbell* for appellees. Reported below: 40 Cal. 2d 271, 253 P. 2d 464.

BLEED. THROUGH POOR COPY